REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, SICHALE & J. MOHAMMED, JJA.)

CIVIL APPLICATION NO. E265 OF 2020

BETWEEN

PBM NOMINEES LIMITED.....APPLICANT

AND

1. PENINA KATHONI NTONG'ONDU

2. MANILAL PREMANAND CHANDARIA

3. ANDREW MUHANDO OVAMBA

4. JOHN OUYA

5. JAQUELINE E. G. MWITI

6. DR. PATRICK LAROCHELLE

7. WINNIE WAMBUI NG'ANG'A

8. JOHN KIGITHO GATHITU

9. ANNE NYAMBURA NJOROGE

10. NICHOLAS MAKAA

11. BENSON M. NDAMBO

12. CHRISTOPHER WAUDO

13. FRANSICA NYAKERARIO MONG'ARE

14. PATRICK NGURE KIGATHI

15. LASER EYE CENTRE LIMITED....RESPONDENTS

(Application for stay of proceedings and stay of execution of the orders of the High Court of Kenya at Nairobi (Makau, J.) dated 27th August 2020 in HC Const. Pet. No. E247 of 2020)

RULING OF THE COURT

On 10th December 2020 we considered the motion on notice dated 1st September 2020 presented to the Court by ***the applicant, PBN Nominees***, for stay of proceedings and stay of execution of the orders of the High Court of Kenya at Nairobi, dated 27th August 2020. We

issued an interim stay of proceedings and execution of the said High Court orders and reserved the ruling to 29th January 2021, which we now render.

By way of background, on 15th February 2007, the applicant and ***the 15th respondent, Laser Eye Centre Ltd***, entered into a sub-lease by which the applicant let to the 15th respondent the premises known as ***LR No. 1870/IX/159, Unit No. TF9, Third Floor, Sarit Centre, Nairobi (the suit property)*** for a term of 5 years and 6 months, terminating on 31st July 2020. The 15th respondent started running on the suit property a specialised ambulatory eye surgery facility that offered ophthalmological medical services and major and minor eye surgical procedures.

On 8th July 2019 before the date of expiry of the lease, the applicant advised the 15th respondent in writing to arrange to hand over vacant possession of the premises because the applicant did not wish to continue the tenancy relation. The 15th respondent however requested the applicant to extend the sub-lease for one more year, and the applicant agreed, subject to the 15th respondent accepting new terms of the lease. The 15th respondent rejected the terms proposed by the applicant as oppressive, and subsequently indicated that it would vacate the suit property upon expiry of the lease.

Shortly before the expiry of the lease, the 15th respondent again wrote to the applicant seeking renewal of the lease for one year, this time on the ground that due to the Covid-19 pandemic, it was not able arrange for experts to travel to Kenya from Italy, USA and South Africa to relocate its delicate and state-of-the-art equipment from the suit property. The applicant agreed to renew the lease, but on the same conditions that it had offered earlier.

The applicant gave the 15th respondent up to 17th June 2020 to confirm in writing that the terms were acceptable.

Instead the 15th respondent moved to the ***Environment and Land Court (ELC)*** where it filed a suit and prayed, substantially, for an order to compel the applicant to grant it a lease to the suit property on the existing terms for one year or such other time as it would take to bring the Covid-19 pandemic under control, worldwide or in Kenya. In a simultaneous interlocutory application, the 15th respondent applied for interim orders that would enable it to continue in possession of the suit property pending the hearing and determination of the suit.

Okong'o, J. heard the application and dismissed it with costs in a ruling dated 30th July 2020, the eve of the expiry of the sub lease. Upon expiry of the lease, the applicant, taking the view that there was no longer any tenancy relationship between it and the 15th respondent, locked up the suit premises in a bid to take possession.

The 15th respondent next moved to this Court under certificate of urgency and applied for an injunction to restrain the applicant from taking possession, evicting or interfering with its possession of the suit property. The 15th respondent also prayed for an order to compel the applicant to allow it to continue in peaceful possession of the suit property on the previous terms, and accept payment of rent and service charge. By a ruling dated 21st August 2020, this Court dismissed the 15th respondent's application with costs, after finding that the intended appeal was not arguable. The Court rendered itself thus:

> "Turning to the merits of the application, it is not in dispute that at all material times the relationship between the applicant and the respondent was that of a tenant and landlord, regulated by a sub-lease agreement which was due to expire and did in fact expire, on 31st July 2020. As of now, there is no longer any tenancy or contractual relationship between the parties. The applicant does not point out any clause in the sub-lease that the respondent has violated, so as to justify the remedies it is seeking. For all intents and purposes, the applicant is inviting the Court to step into the shoes of the parties and fashion out for them a new lease agreement, to run for an indefinite period. While the courts must protect the parties by enforcing the agreements and contracts that they have freely negotiated and entered into, it cannot, with respect, force agreements and contracts on the parties."

On 17th August 2020, four days before delivery of this Court's ruling, the other respondents in this application, who claim to be clients of the 15th respondent, moved to the High Court and filed ***Constitutional Petition No. E247 of 2020*** for enforcement of their constitutional right to the highest attainable standard of health under ***Article 43(1)*** of the ***Constitution***, which they claimed they could only get from the 15th respondent. On 28th August 2020, the High Court ***(Makau, J.)*** issued a conservatory order restraining the applicant from denying the said respondents access or inhibiting them from obtaining treatment from the 15th respondent on the suit property. In effect therefore, the High Court, at the instance of the said respondents, created a tenancy relationship between the applicant and the 15th respondent long after the expiry of their sub-lease.

The applicant was aggrieved and filed a notice of appeal on 28th August 2020, followed by this application for stay of proceedings and stay of execution of the orders of the High Court. The applicant contends that it has an arguable appeal because the High Court erred by entertaining a matter over which it had no jurisdiction; by failing to see that the petition was a deliberate abuse of the process of the court; by failing to appreciate that the prime mover in the petition was the 15th respondent after he had failed to convince the courts to impose a lease; by entertaining issues that had been conclusively or substantially determined by the this Court and the ELC; by ignoring the principle of *res judicata;* by holding that the respondents had established a *prima-faci*e case without any evidence that the 15th respondent was the only and exclusive eye-caregiver in the country; by ignoring and violating the applicant's right to property under ***Article 50*** of the Constitution; and by foistering on the applicant a lease agreement at the instance of strangers with whom it had no legal or contractual relations.

As regards whether the intended appeal stands to be rendered nugatory, the applicant contends that the High Court has denied it the benefits of the decisions in its favour from this Court and the ELC; has denied it enjoyment of its property by creating an indefinite and free of charge lease in favour of the 15th respondent; has imposed on it a lease without any clear obligations on the respondents; and that it stands to suffer irreparable loss and damage through the violation of its right to property.

The respondents opposed the application by several replying affidavits sworn on behalf of the 15th respondent and by the 1st respondent. The gist of their response is that the intended appeal is not arguable and if it is, it will not be rendered nugatory if it succeeds. They contended that the decision of the High Court was not *res judicata* because neither this Court nor the ELC considered the claims of the other

14 respondents, who were not parties before those courts; that in issues of enforcement of constitutional rights the High Court has jurisdiction; and that the applicant's right to property was not absolute and could be limited by justifiable grounds such as the right to health of the 14 respondents.

On whether the intended appeal would be rendered nugatory, the respondent maintained that the applicant would not suffer any loss or damage as the 15th respondent occupies only a small portion of the suit premises; that the 15th respondent was willing and had offered to pay current market rates for the suit premises; and that in any event an ward of damages would be an adequate remedy.

We have carefully considered the application and whether there is an arguable appeal which stands to be rendered nugatory if it succeeds without stay of execution. (See ***Jaribu Holdings v. Kenya Commercial Bank [2008] eKLR).*** It has been stated time and again that an arguable appeal is not one that must succeed at the hearing. It is merely one that is not frivolous or one that raises a *bona fide* issue that deserves to be investigated by this court (See ***Kenya Railways Corporation v. Edermann Properties Ltd, CA No. Nai. 176 of 2012).*** Such an appeal need not raise a multiplicity of issues, even one issue will suffice (See ***Josephine Koi Reymond v. Philomena Kanini Maingi & Another (2018) eKLR.*** Looking at the applicant's draft memorandum of appeal, we are satisfied that it raises weighty issues, including among others, jurisdictional issues and the question of availability of alternative eye-care givers. Those issues deserve full consideration and resolution by the Court.

As to whether the intended appeal will be rendered nugatory, this limb of the application depends on the peculiar circumstances of each case. (See ***Reliance Bank Ltd v. Norlake Investments (2002 1 EA 227)***. We are satisfied that the applicant, who has two valid decisions of this Court and of the ELC in its favour stands to suffer considerably where, as in this case the relationship created by the court between it and the 15th respondent has *prima facie*, no definite terms or lifespan. At this stage, we are not required to express ourselves more to avoid embarrassing the bench that will ultimately hear the appeal. That is properly the province of that bench, which we cannot anticipate or second guess. (See ***Central* Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others, *CA No. 95 of 1999).***

For the foregoing reasons, we are satisfied that the applicant has established both considerations under ***rule 5(2)(b)*** of the rules of this Court (See ***Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31).*** Accordingly the motion dated 1st September 2020 is hereby allowed. Proceedings in ***High Court Constitutional Petition No. E 247 of 2020*** and execution of the order of the High Court dated ***27th August 2020*** in the said petition are hereby stayed until the hearing and determination of the applicant's intended appeal. Costs shall abide the outcome of the intended appeal. It is so ordered.

Dated and delivered at Nairobi this 29th day of January, 2021

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR